Supreme Court, U.S.
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No. 03-983

IN THE

Supreme Court of the United States

JAMES B. JONES, SR.,
Petitioner,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Ohio state courts, in this case arising under the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.*, properly applied the longstanding federal standard established by this Court in granting judgment notwithstanding the verdict after finding that petitioner had not offered even a scintilla of evidence of negligence?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent states that the parent corporation is the Norfolk Southern Corporation. No other publicly held corporation owns more than 10% of Respondent's stock.

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STATEMENT OF THE CASE

On October 25, 2000, Petitioner James B. Jones, Sr. ("Jones") filed his Complaint, alleging a claim under the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.* ("FELA"). The case was tried to a jury on June 4 and 5, 2001. During the trial, Respondent Norfolk Southern Railway Company ("Norfolk Southern") moved for a directed verdict at the close of Jones's case and at the close of all of the evidence. The trial court denied these motions.

On June 5, 2001, the jury returned its verdict in favor of Jones. Judgment was entered and journalized on June 11, 2001.

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Norfolk Southern timely filed post-trial motions, including a motion for judgment notwithstanding the verdict pursuant to Ohio Civ.R. 50, a motion for a new trial pursuant to Ohio Civ.R. 59, and a motion for remittitur.[1] In an Opinion and Judgment Entry filed on November 15, 2001, and journalized on November 16, 2001, the trial court granted Norfolk Southern's motion for judgment notwithstanding the verdict and entered final judgment in favor of Norfolk Southern. The trial court found that the motions for a new trial and for remittitur were moot.

In its Opinion and Judgment Entry, the trial court specifically found:

> ▪ The record is devoid of any evidence, much less "more than a scintilla of evidence," that Norfolk Southern breached any duty to Jones in relation to his cumulative-trauma back injury (Pet. App. A-18).
>
> ▪ There is a complete dearth of evidence (much less expert evidence) identifying established risk factors for the repetitive-trauma back injury of which Norfolk Southern reasonably should have been aware (Pet. App. A-21).
>
> ▪ Not even a scintilla of evidence exists to suggest the inadequacy of Norfolk Southern's safety meetings, its work procedures, or its practice of often combining work crews (when the B&B crews were shorthanded) (Pet. App. A-21).
>
> ▪ The record also unequivocally reflects that Norfolk Southern had no notice of any specific risk of repetitive-trauma back injury or of Jones's own back problems until late October, 1997 (Pet. App. A-21).

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[1] A copy of Ohio Civ.R. 50 is included in the Appendix. Ohio Civ.R. 59 is not included because it has no application to the issues involved in this case.

- Not a scintilla of evidence exists indicating that Norfolk Southern breached a duty of care to Jones in regard to the cumulative-trauma back injury for which he seeks recovery under the FELA (Pet. App. A-22).

The trial court's final judgment was affirmed by the Sixth District Court of Appeals of Lucas County, Ohio. The Court of Appeals found:

- Jones failed to offer even a scintilla of evidence tending to show that Norfolk Southern breached any duty to provide a reasonably safe work place for the B&B crew and/or failed to provide protection from known dangers (Pet. App. A-9).

- Jones failed to offer any evidence that the absence of one worker on some occasions precluded the crew from accomplishing its task in the usual customary way (Pet. App. A-9).

- No evidence in the record demonstrated that the tools and equipment used by the B&B crew were unsafe or unsuitable for the assigned task (Pet. App. A-9).

Jones appealed to the Supreme Court of Ohio, which allowed the appeal. Merit briefs were filed by both parties. Oral arguments were heard on June 3, 2003. On July 16, 2003, the Supreme Court of Ohio dismissed Jones's appeal, *sua sponte*, as having been improvidently allowed. On September 10, 2003, Jones's motion for reconsideration was denied.

REASONS FOR DENYING THE PETITION

The petition for certiorari is based strictly on semantics and not substance and claims a conflict with the precedent of this Court that does not exist. Jones effectively concedes that the decision below is fully consistent with *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943), but stakes his petition on the implausible claim that this Court *sub silentio* overruled *Brady*

three years later in *Lavender v. Kurn*, 327 U.S. 645 (1946). That is untrue. There is no substantive distinction between *Brady* and *Lavender*, or between either of those decisions and Ohio law, and this Court has consistently reaffirmed the *Brady* standard in later decisions. Here, the state courts applied the proper federal standard, and did so correctly. Norfolk Southern's motion for judgment notwithstanding the verdict was properly granted because Jones failed to present sufficient proof upon which a jury could reasonably find the elements of negligence—breach of duty, foreseeability, and causation[2]—not because the Ohio courts applied the wrong law. In all events, this case would not be a proper vehicle for review because Norfolk Southern would prevail under any conceivable standard, given that the court of appeals (like the trial court) found that Jones did not present a "scintilla of evidence" of negligence on the part of the railroad, Pet. App. A-9 (court of appeals); Pet. App. A-18, 21, 22 (trial court).

The decisions of the Ohio courts were based upon the application of federal substantive FELA law. In *Vance v. Consolidated Rail Corp.*, 73 Ohio St.3d 222 (1995), which is cited by the Ohio Court of Appeals in its Opinion in this case, Pet. App. A-5, the Supreme Court of Ohio stated, at 227:

> What constitutes negligence for purposes of the FELA is a federal question, which does not vary under different conceptions of negligence under non-FELA state and local laws. "Federal decisional law formulating and applying the concept governs." *Urie v. Thompson* (1949), 337 U.S. 163, 174, 69 S.Ct. 1018, 1027, 93 L.Ed.2d 1282, 1295. Generally, "FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal." *St. Louis*

[2] The trial court specifically held that Jones failed in his proof as to the element of breach of duty and deferred addressing Norfolk Southern's claim that Jones also failed in his proof as to the elements of foreseeability and causation.

> *Southwestern Ry. Co. v. Dickerson* (1985), 470 U.S. 409, 411, 105 S.Ct. 1347, 1348, 84 L.Ed.2d 303, 306. . . . As a state court, we are as capable of interpreting the FELA as a federal court would be, but we apply the same federal law as the federal courts, without regard to Ohio's negligence law. . . .

Here, the Court of Appeals quoted from Ohio Civ.R. 50, which governs motions for judgment notwithstanding the verdict and was the procedural mechanism which brought the issue of the sufficiency of evidence before the trial court. But the trial court in ruling on the Rule 50(B) motion expressly applied federal substantive FELA law, as did the court of appeals in reviewing that ruling. The trial court specifically stated:

> A jury question is created in an FELA case if, "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. . . . The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence." *Rogers v. Missouri Pacific R.R. Co.* (1957), 352 U.S. 500, 506-07, ... [Pet. App. A-14].

The trial court then held that under the FELA a "plaintiff must present more than a scintilla of evidence" to prove the elements of his claim, citing *Aparicio v. Norfolk & Western Ry.*, 84 F.3d 803, 810 (6th Cir. 1996), but found that "the record is devoid of any evidence, much less 'more than a scintilla of evidence,' that the Railway breached any duty to Mr. Jones in relation to his cumulative-trauma back injury." Pet. App. A-22. The court of appeals, likewise citing *Aparicio*, agreed that Jones had failed to offer a "scintilla of evidence" in support of his claim, and affirmed. Pet. App. A-9.

The decision below does not conflict in any manner with the decisions of this Court. In *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943), the Court established the standard to be applied by state courts in a FELA case to determine the sufficiency of evidence to justify the submission of the case to the jury. At page 479, Justice Reed wrote:

> There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers' Liability cases, this question must be determined by this Court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act's authority in state courts. Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states. *Western & Atlantic R. Co. v. Hughes*, 278 U.S. 496, 498; *Chicago, M. & St. P. Ry. Co. v. Coogan*, 271 U.S. 472, 474. Cf. *United Gas Co. v. Texas*, 303 U.S. 123, 143. . . . But when a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question. **The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury**. *Western & Atlantic R. Co. v. Hughes, supra*; *Baltimore & Ohio R. Co. v. Groeger*, 266 U.S. 521, 524. Cf. *Gunning v. Cooley*, 281 U.S. 90, 94; *Commissioners v. Clark*, 94 U.S. 278, 284. **When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict**. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.

> *Galloway v. United States*, 319 U.S. 372; *Pence v. United States*, 316 U.S. 332; *Baltimore & Ohio R. Co. v. Groeger*, 266 U.S. 521, n.1; *Anderson v. Smith*, 226 U.S. 439; *Coughran v. Bigelow*, 164 U.S. 301, 307; *Gunning v. Cooley*, 281 U.S. 90, 93, note; *Seaboard Air Line v. Padgett*, 236 U.S. 668, 673; *Parks v. Ross*, 11 How. 362, 373. See IX Wigmore on Evidence (3d ed., 1940), §§2494 *et seq.* (Emphasis added)

The Ohio courts did not diverge in any respect from *Brady* in applying federal law.[3]

In *Brady*, the Court, acting in response to its charge under the Supremacy Clause, adopted a uniform federal rule for states to apply to determine the sufficiency of evidence in a FELA action. The standard set by the Court in *Brady* requires courts to analyze the evidence to determine whether the only reasonable conclusion that could be drawn from the evidence is that the plaintiff has not presented more than a scintilla of evidence to support the FELA claim. This standard was followed by the Ohio courts.

Lavender v. Kurn, 327 U.S. 645 (1946), *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500 (1957), and other Supreme Court decisions after *Brady* did not change the standard by which

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[3] The Ohio courts applied federal, not state law, but regardless there is no substantive distinction between Ohio law and the federal standard established in *Brady*. This Court in *Brady* used virtually the same language—that a verdict should be directed by the court "[w]hen the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict," 320 U.S. at 479—as is used in Ohio Civ.R. 50(A), which requires a directed verdict if the trial court "finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted." See Resp. App. 1. This is the standard applied by Ohio courts in deciding a motion for judgment notwithstanding the verdict under Ohio Civ.R. 50(B). (Resp. App. 1) *Nickell v. Gonzalez*, 17 Ohio St.3d 136 (1985), *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St. 3d 677 (1998).

courts were to analyze whether sufficient evidence had been presented to submit a case to the jury. *Brady* has not been overruled or distinguished by the Court. Jones engages in a game of semantics in an attempt to avoid the consequences of his failure of proof. But Jones cannot escape from the long-established standard requiring a trial court to apply a test of reasonableness when appraising the evidence to determine if sufficient evidence has been presented. Under *Lavender, supra*, there must be "a reasonable basis in the record" from which negligence can be inferred; Jones relies on the phrase "complete absence of probative facts" in *Lavender*, 327 U.S. at 653, but that clearly means a "complete absence of probative facts" upon which a reasonable jury could render a verdict in favor of the plaintiff, which is exactly the *Brady* standard.

If there were any doubt as to the matter, this Court in cases subsequent to *Lavender* has repeatedly used the very kind of "reasonable minds" language that Jones claims to have been discarded by this Court in *Lavender*. *See Baker v. Texas & Pac. Ry. Co.*, 359 U.S. 227, 228 (1959) ("Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury"); *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949) (noting the standard to be whether "fair-minded men might draw different inferences" from the evidence, and noting that this has long been "the established rule for trial and appellate courts"); *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947) ("Once there is a reasonable basis in the record for concluding that there was negligence, which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion") (citing *Brady* and *Lavender*); *see also Urie v. Thompson*, 337 U.S. 163, 175 n. 14 (1949) (citing *Brady*).

Nor did this Court's decision in *Rogers* alter the standard for review of the sufficiency of the evidence to support a jury verdict. First, in *Baker* (decided after *Rogers*), this Court

continued to adhere to its longstanding standard of review. Second, nothing in *Rogers* suggests any departure from that standard. In that case, this Court emphasized that the evidence must "justify with reason" the conclusion that negligence of the employer played any part in the producing the claimed injury. *Rogers* at 448.

In *Dessi v. Pennsylvania R.R. Co.*, 251 F.2d 149 (3rd Cir. 1958), the court analyzed the *Rogers* decision at page 151:

> The repeated use of the phrase "with reason"—it appears three times in this short paragraph [referring to *Rogers*]—is **a persuasive indication that the court intended no departure from the familiar and normal requirement of our jurisprudence**, as repeatedly stated in its own rather recent decisions, **that the party with the burden of proof must "present probative facts from which the negligence and the causal relation could reasonably be inferred**." See *Tennant v. Peoria & P. U. Ry. Co.*, 1944, 321 U.S. 29, 32, 64 S.Ct. 409, 411, 88 L.Ed. 520; *Myers v. Reading Co.*, 1947, 331 U.S. 477, 485, 67 S.Ct. 1334, 91 L.Ed. 1615; and compare the rationalization in *Lavender v. Kurn*, 1946, 327 U.S. 645, 653, 66 S.Ct. 740, 90 L.Ed. 916. (Emphasis added.)

As set forth in the Statement of the Case above, the Ohio courts applied a *Brady-Lavender* analysis. Both Ohio courts analyzed the evidence adduced at trial in accordance with the applicable federal standard in FELA cases. *Brady* commands that "[t]he weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury." 320 U.S. at 479. Here, the trial court specifically invoked the FELA standard that "the employee must present more than a scintilla of evidence on the elements of his or her claim to create a jury question," Pet. App. A-16, (citing *Aparicio v. Norfolk & Western Ry.*, 84 F.3d 803, 810 (6th Cir. 1996). The Court of Appeals ruled that "in viewing

the evidence adduced in the present case in a light most favorable to [Jones], we can only conclude that he failed to offer even a scintilla of evidence tending to show that appellee breached any duty to provide a reasonably safe workplace for the B&B crew and/or failed to provide protection from known dangers." Pet. App. A-8, 9. Jones can hardly complain that the court of appeals applied the *Aparicio* standard, given that Jones had affirmatively urged the court of appeals to apply that standard. C.A. Brief of Appellant James B. Jones, Jr., at 14 ("only 'slight' or, more than a scintilla . . . but not much more' evidence of negligence creates a jury question on the issue of railroad liability. *Harbin*, 921 F.2d at 131; *Aparicio*, 84 F.3d at 810"). The court of appeals applied federal law, and like the trial court, correctly found that Jones failed in his proof under the federal FELA standard.[4]

Recognizing that the Ohio courts fully analyzed the sufficiency of the evidence in accordance with the standards established by the Court in *Brady, Lavender, Rogers*, and other cases, Jones's argument is reduced to its actual, but fallacious, meaning—that in a FELA case a trial court has no role in determining whether sufficient evidence has been produced to justify the submission of the case to the jury. Jones's argument is simply wrong. Courts are not just referees but have responsibility to apply law to protect parties from legally unfounded claims.

Because the Ohio courts, both at the trial and appellate levels, have conducted exhaustive analyses of the evidence presented at trial in accordance with federal substantive FELA law and have determined that reasonable minds could only conclude that Jones failed to produce sufficient evidence

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[4] The fact that the court of appeals earlier had adverted in its opinion to the state rule governing motions like this one is of no moment. The court of appeals never suggested that it was applying anything but the federal substantive rule, and in any event the state and federal standards do not diverge. See *supra* n.3.

from which a jury could find "with reason" that Norfolk Southern negligence played a part in producing the injury for which damages were sought, the Ohio courts have not improperly deprived Jones of his federal rights under the FELA. Norfolk Southern's motion for judgment notwithstanding the verdict was properly granted because Jones failed in his proof, not because Ohio courts applied the wrong law.[5]

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[5] Jones contests the rulings below that his proof of negligence was inadequate, but that factbound question has no importance outside this case and does not warrant the Court's review.

APPENDIX

APPENDIX

Civ R 50 Motion for a directed verdict and for judgment notwithstanding the verdict

(A) Motion for directed verdict

(1) When made. A motion for a directed verdict may be made on the opening statement of the opponent, at the close of the opponent's evidence or at the close of all the evidence.

(2) When not granted. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts.

(3) Grounds. A motion for a directed verdict shall state the specific grounds therefor.

(4) When granted on the evidence. When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

(5) Jury assent unnecessary. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(B) Motion for judgment notwithstanding the verdict

Whether or not a motion to direct a verdict has been made or overruled and not later than fourteen days after entry of

judgment, a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion; or if a verdict was not returned such party, within fourteen days after the jury has been discharged, may move for judgment in accordance with his motion. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment. If the judgment is reopened, the court shall either order a new trial or direct the entry of judgment, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence. If no verdict was returned the court may direct the entry of judgment or may order a new trial.

(C) Conditional rulings on motion for judgment notwithstanding verdict

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (B) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule *59* not later than fourteen days after entry of the judgment notwithstanding the verdict.

(D) Denial of motion for judgment notwithstanding verdict

If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

(E) Statement of basis of decision

When in a jury trial a court directs a verdict or grants judgment without or contrary to the verdict of the jury, the court shall state the basis for its decision in writing prior to or simultaneous with the entry of judgment. Such statement may be dictated into the record or included in the entry of judgment.